BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH SMITH	)	
Claimant	)	
	)	
VS.	)	
	)	
ATRIUMS HAIR SALON	)	
Respondent	)	Docket Nos. 1,033,559 &
	)	1,033,560
	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INS. CO.[1]	)	
TWIN CITY FIRE INS. CO.[2]	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the February 24, 2011 Award on Remand by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 7, 2011.

APPEARANCES

John R. Stanley, of Overland Park, Kansas, appeared for the claimant. Patricia A. Wohlford, of Overland Park, Kansas, appeared for respondent and its insurance carriers (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties agree that the Award contains an inaccurate mathematical calculation on page 3 as it relates to the temporary total disability (TTD) claimant was paid. Pursuant

[1] 1,033,559

[2] 1,033,560

to the parties' stipulation, claimant was paid 111.96 weeks of TTD at a corrected weekly rate of $322.81[3], for a total of $36,141.80. In addition to those sums, claimant received additional TTD benefits for a period of 50.01 weeks, for a sum totaling $16,143.72 and for which respondent is entitled to credit against any permanency ultimately awarded.

The parties also agree that claimant's counsel paid $519.65 in court reporter fees and respondent concedes that it should be responsible for those costs and will promptly reimburse claimant's counsel.

Lastly, neither party takes issue (either in its brief or at oral argument) with the functional impairment ratings assessed by the ALJ and further concedes claimant sustained a 100 percent wage loss following her compensable injury.

ISSUES

The ALJ revisited this case on remand from the Board[4] and reviewed the entire record including the depositions of Michelle Sprecker and Dr. James Zarr and found the claimant to bear an 18.5 percent impairment to each of her upper extremities as well as a 5 percent impairment to the cervical spine and a 50 percent work disability.[5] He specifically concluded that claimant was not permanently and totally disabled under K.S.A. 44-510c.

Claimant has appealed, arguing the ALJ erred in finding that she was not permanently and totally disabled.[6] Claimant asks that the Board reverse the ALJ and find that claimant is essentially and realistically unemployable and as such permanently and totally disabled under K.S.A. 44-510c. Claimant also requests future medical treatment as her work injury requires as recommended by the treating physician, Dr. Gary G. Berger.

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[3] The original rate used was $467.00 and the total TTD paid was $52,285.32.

[4] Upon its initial presentation to the Board from an appeal from the ALJ's October 20, 2010 Award, this matter was remanded to the ALJ . It was clear from the October 20, 2010 Award that the ALJ had yet to review the entire record submitted by the parties.

[5] When the ALJ first saw this claim, the record was lacking two depositions which had been taken in a timely manner but had, for some reason, not been transmitted to the ALJ. Thus, his initial decision which found claimant was permanently and totally disabled was reversed and the claim was remanded for a full consideration of the entire record. The 50 percent work disability is based upon a 100 percent wage loss and a 0 percent task loss.

[6] As claimant notes, whether the task loss component of the work disability is increased is irrelevant, as the 50 percent work disability finding entitles claimant to the maximum $100,000 award under K.S.A. 44-510f.

Respondent asks the Board to merely affirm the ALJ's Award as it contends the evidence rebuts any presumption that claimant is permanently and totally disabled and further, that she failed to prove her task loss and is therefore limited to a 50 percent work disability, a percentage that is based solely upon her wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds as follows:

The ALJ's Award on Remand sets out the facts and circumstances as well as the medical testimony surrounding claimant's injury in a detailed and accurate manner. Rather than restate the facts and medical evidence, the Board adopts the ALJ's recitation of the facts and medical testimony as its own as if specifically set forth herein except as noted.

Respondent concedes claimant sustained a compensable injury on January 1, 2007.[7] Likewise, respondent does not dispute the ALJ's finding that claimant's injury resulted in impairment to her upper extremities (18.5 percent to each) as well as an impairment to the cervical spine (5 percent). However, claimant maintains that she has not only established a permanent partial general (work) disability under K.S.A. 44-510e(a), which is comprised of a 100 percent wage loss **and** a 67 percent task loss, but that she has further proven that she is permanently and totally disabled as that term is defined in K.S.A. 44-510c. Respondent urges the Board to affirm the ALJ's findings both in respect to functional impairment and his conclusion that claimant failed to appropriately establish a task loss which is causally connected to her work-related injury.

The sole focus in this appeal is on the nature and extent of claimant's resulting impairment as a result of her January 1, 2007 work-related injury. The ALJ's findings with respect to claimant's functional impairment are unchallenged. However, there is a dispute amongst the parties as to whether claimant has sufficiently established a task loss as required by K.S.A. 44-510e(a) and whether claimant is, based upon this record, permanently and totally disabled. Because permanent total disability benefits under K.S.A. 44-510c will eclipse any permanent partial general (work) disability award, the permanent total issue will be addressed first.

K.S.A. 44-510c(a)(2) defines permanent total disability as:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of

[7] Although there are two separate claims, they are for the same insured and related carriers. The parties proceeded with these claims as one and agreed upon an accident date of January 1, 2007.

> substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability.[8]

And by virtue of her bilateral upper extremity impairment, claimant has the benefit of a statutory presumption in favor of a finding of permanent total disability.[9]

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[10], held that "[t]he trial court's finding that *Wardlow* is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

Dr. P. Brent Koprivica has testified that claimant not only has a functional impairment, but that her present condition warrants a number of restrictions, including no repetitive hand flexion/extension, no above shoulder work or repetitive reaching, pushing or pulling. He also limited her to sedentary work. Ultimately, Dr. Koprivica opined that practically and realistically claimant was permanently and totally disabled based on her multiple impairments.[11] Conversely, Dr. Zarr found claimant required no work restrictions whatsoever, although he provided a permanent impairment rating for both her upper impairment and cervical conditions.

Here, both vocational experts seem to concede that claimant can no longer be a hairdresser. Her diagnoses and ongoing complaints of pain both in her upper extremities and her neck clearly preclude her from performing the only occupation she has had in the last 15 years. Indeed, the uncontroverted testimony from respondent was that she was terminated from her job as a hairdresser because she could no longer adequately perform her job duties.

One vocational expert, Terry Cordray, testified that claimant would be qualified for sedentary unskilled jobs, which according to him comprise 1 to 1-1/2 percent of the job market. He went on to explain that those same jobs require intensive use of the upper extremities and given claimant's work restrictions, she was not placeable in the labor market.

On the other hand, respondent's vocational expert, Michelle Sprecker, testified that

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[8] K.S.A. 44-510c(a)(2).

[9] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (May 8, 2007).

[10] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

[11] Koprivica Depo. at 17.

even under Dr. Koprivica's restrictions, claimant could be a security guard, rental clerk, telemarketer, or a sales or order clerk, positions that were opening available in the Springfield, Missouri, area. However, Ms. Sprecker failed to explain how someone with claimant's diagnoses, ongoing daily symptoms with respect to her hands, upper extremities and neck, could perform the referenced jobs. Claimant has no history of clerical work, working with computers or any sort of office equipment. And daily contact with such equipment would most certainly violate Dr. Koprivica's work restrictions. Claimant weighs 98 pounds so her capacity to be some sort of a security guard is, at best, doubtful. Ms. Sprecker testified that "[i]t's my opinion that jobs would exist within these areas which may allow Ms. Smith to work within the physical restrictions identified by Dr. Koprivica. However selective placement may be necessary."[12]

The ALJ concluded that the testimony offered by Ms. Sprecker effectively rebutted the statutory presumption in favor of permanent total disability.[13] The Board has carefully reviewed the entire record as a whole and concludes the ALJ's finding on this issue should be reversed. Not only is claimant entitled to the presumption of permanent total disability under K.S.A. 44-510c, the Board finds that respondent has failed to rebut that presumption. Accordingly, the Award is modified to grant claimant permanent total disability benefits.

In light of the foregoing finding as to permanent total disability benefits, the balance of the parties' arguments as to work disability are moot.

As an aside, at oral argument the parties disputed whether the medical records of Dr. Berger were considered to be in evidence for purposes of this Award. Both parties agree that Dr. Berger's records were marked as an exhibit to Dr. Koprivica's deposition but respondent maintained that his records were merely offered to show what records Dr. Koprivica reviewed in making his determinations. Respondent argued that the contents of the reports themselves were not evidence inasmuch as Dr. Berger had not been deposed.[14] Claimant maintained these records were admitted without objection and respondent's belated complaint should be overruled.

In this instance, the ALJ initially issued an Award before the balance of respondent's evidence was submitted. In that first Award, he listed the contents of the record and included Dr. Koprivica's deposition *including exhibits.*[15] The matter was remanded to the

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[12] Sprecker Depo. at 32.

[13] ALJ Award on Remand (Feb. 24, 2011) at 4.

[14] K.S.A. 44-519.

[15] ALJ Award (Oct. 20, 2010) at 2.

ALJ for consideration of the entire record. Upon the issuance of the Award which now brings this appeal to the Board a second time, the Award again contained a reference to the record which included Dr. Koprivica's deposition, *including exhibits*. If respondent wanted to make the admission of Dr. Berger's opinions, an issue in light of K.S.A. 44-519, it could have done so at the time of Dr. Koprivica's deposition. Failing that, it had another opportunity in its submission letter to the ALJ and again when the original Award was issued and the case was appealed to the Board. After the claim was remanded and once again appealed, the issue was again not raised. It was only at oral argument to the Board that respondent suggested that Dr. Berger's records should not be considered. This complaint is anything but contemporaneous and is overruled.[16]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award on Remand of Administrative Law Judge Kenneth J. Hursh dated February 24, 2011, is affirmed in part and reversed in part.

The claimant is entitled to 111.96 weeks temporary total disability compensation at the rate of $322.81 per week or $36,141.81 followed by permanent total disability compensation at the rate of $322.81 per week not to exceed $125,000.00 for a permanent total general body disability.

As of June 24, 2011 there would be due and owing to the claimant 111.96 weeks of temporary total disability compensation at the rate of $322.81 per week in the sum of $36,141.81 plus 121.61 weeks of permanent total disability compensation at the rate of $322.81 per week in the sum of $39,256.92 for a total due and owing of $75,398.73, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $49,601.27 shall be paid at $322.81 per week until fully paid or until further order of the Director.

[16] See Anderson v. Scheffler, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991); State v. Carter, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

IT IS SO ORDERED.

Dated this _____ day of June 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John R. Stanley, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge